



TC02987

Appeal number: TC/2013/04655

TYPE OF TAX – PAYE – late submission of Employer’s Annual Return – whether scale of penalty is reasonable , and whether penalty is unfair and should be reduced - Decision of Upper Tribunal in Hok Ltd applies. Whether reasonable excuse for late submission of return –Yes for part of the period .

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SMART POLYMERS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: PRESIDING MEMBER
 PETER R. SHEPPARD FCIS FCIB CTA
 AIIT**

The Tribunal determined the appeal on 4 October 2013 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 10 July 2013, and HMRC’s Statement of Case received by the Tribunal on 23 August 2013 with enclosures. The Tribunal wrote to the Appellant on 28 August 2013 indicating that if they wished to reply to HMRC’s Statement of Case they should do so within 30 days. No reply was received.

DECISION

1. Introduction

5 This considers an appeal against two penalties totalling £1,200 levied by HMRC for the late filing by the appellant of its Employer Annual Returns (form P35) for the year 2011 – 2012.

2. Legislation

Income Tax (PAYE) Regulations 2003, in particular Regulations 73 and 205.

10 Social Security (Contributions) Regulations 2001 in particular Schedule 4 Paragraph 22.

Taxes Management Act 1970, in particular Section 98A(2) and (3); Section 100; Section 100B; and Section 118 (2).

3. Case law

HMRC v Hok Ltd. [2012] UKUT 363 (TCC)

15 4. Facts

Regulations 73(1) and 205 of Income Tax (PAYE) Regulations 2003 and Paragraph 22 of Schedule 4 of Social Security (Contributions) Regulations 2001 require an employer to deliver to HMRC a complete Employer Annual Return (Forms P35 and P14) electronically before 20 May following the end of the tax year. In respect of the
20 year 2011-2012 HMRC say the appellant failed to submit Form P35 on line. On 24 September 2012 HMRC sent the appellant a late filing penalty notice for £400 for the 4 month period 20 May 2012 to 19 September 2012. On 27 May 2013 HMRC sent the appellant a final late filing penalty notice for £800 for the period 20 September 2012 to 19 May 2013.

25 5. The appellant states “Smart Polymers did comply with their tax obligation to complete and file a 2011-2012 employer annual return before 19 May 2012. The Annual Return could not be submitted electronically due to a problem i.e. several “no name supplied” entries in the employee list which could not be removed. This prevented the information being transmitted and received successfully by HMRC.

30 6. John Anderson, the only employee of the company, therefore wrote to HMRC on 15 May 2012 (i.e. before the due date) to explain the difficulty and enclosed a hard copy of the return. He pointed out that he had saved the details on the website where HMRC would find them. He said that he had tried over several days to call the helpdesk but it is impossible to get through. He asked for assistance in resolving the
35 difficulty.

7. HMRC’s reply to this letter is dated 9 July 2012 and after apologising for the delay in replying states “Unfortunately I am unable to assist in this matter as we do

not have the knowledge required to advise on filing online. Please contact the helpdesk on 08457143143 who should be able to help you resolve this matter.”

5 8. In a letter dated 15 March 2013 the appellant states “I tried the numberon several occasions between business trips. On each such occasion I was referred to / passed to various different departments none of whom were able to assist. I spend significant time and cost for calls on this exercise which was a complete waste of time and did not resolve the problem.” The Tribunal notes that the appellant was subsequently given a helpline number different from the one specified in the letter of 9 July 2012.

10 9. The appellant complains that an overpayment of PAYE/NIC of over £400 has been due to him from HMRC for almost 2 years. This is a separate matter not covered by this appeal and so the Tribunal makes no further comment on it.

15 10. The appellant also states “I believe that I have made the effort and tried to resolve this PAYE return issue with HMRC on several occasions and through no fault of my own I have been unable to bring things to a successful conclusion. The information was prepared in time but could not be processed through no fault of mine. The facts can be checked on the website.”

20 11. The appellant had similar problems when trying to submit its 2012/2013 return. He said I called the HMRC Help desk again pre 19 May 2013 and spoke for over 20 minutes on the telephone with an assistant who kept advising me to try different things on the computer to resolve the problem however at the end of the day nothing was resolved. The appellant went abroad for a few weeks but before doing so sent an e-mail to the help desk which appears to have reached the wrong helpdesk (VAT). On his return from abroad the appellant sent an e-mail to the Online Services helpdesk who responded by giving a series of instructions which if completed should have allowed submission of the returns. The instructions did not resolve the issue but they did give yet another contact number. Mr Anderson contacted that number and during a lengthy telephone call was assisted in resolving the problem.

30 12. HMRC say that they endeavour to provide assistance at the earliest opportunity when a customer makes contact. Nevertheless, HMRC acknowledge that at certain times of the year they do receive an above average amount of traffic, for example at filing or payment deadlines. HMRC contend that it would be reasonable for a customer who is unable to receive assistance at that time to persevere and call back.

35 13. HMRC say they have no record of receiving the hard copy which the appellant states that he sent before the due date of 19 May 2012.

40 14. HMRC say they wrote to the appellant on both 9 July and 7 November 2012 suggesting that the appellant contacts the help desk. In their letter of 24 June 2013 giving the conclusion of their review to the appellant HMRC say “Online Services have informed me that there is no record of any contact in 2012.” However in their statement of case HMRC say that the appellant “did contact HMRC’s online services helpdesk on 10 December 2012 and made no further contact until 8 May 2013.”

15. The Tribunal observes that after this there follows no written communications from HMRC other than penalty notices and the like. There is no letter from HMRC to the appellant to help resolve the problem.

5 16. The level of the penalty and whether HMRC's failure to send a prompt advice was unfair are all covered in the decision of the Upper Tribunal in the case of Hok Ltd. That decision also considers whether the jurisdiction of the First-tier Tribunal includes the ability to discharge a penalty on the grounds of unfairness. At Paragraph 36 of that decision it states "...the statutory provision relevant here, namely TMA s 100b, permits the tribunal to set aside a penalty which has not in fact been incurred, or
10 to correct a penalty which has been incurred but has been imposed in an incorrect amount, but it goes no further. it is plain that the First-tier Tribunal has no *statutory* power to discharge, or adjust a penalty because of a perception that it is unfair."

15 17. The level of the penalties has been laid down by parliament. The only other consideration that falls within the jurisdiction of the First-tier Tribunal is whether or not the appellant has reasonable excuse for his failure as contemplated by the Taxes Management Act 1970 Section 118(2). In this respect the appellant clearly had tried to submit its Annual return on line but had encountered difficulties submitting its return electronically. John Anderson the only employee of the company therefore wrote to
20 HMRC on 15 May (i.e. before the due date) enclosing a hard copy of the return and explaining the difficulty and to point out that he had saved the details on the website where HMRC would also find them. He said that he had tried over several days to call the helpdesk but it is impossible to get through. Whilst the Tribunal does not accept it is impossible to get through it is aware of the considerable difficulties many taxpayers
25 have in getting through. Mr. Anderson asked for assistance in resolving the problem. In the Tribunal's view these were the actions of a responsible taxpayer faced with a difficulty he could not overcome. HMRC effectively had the information they required but perhaps not submitted in the way they would prefer or required by legislation.

30 18. The Tribunal consider that the appellant's actions establishes a reasonable excuse for failing to submit the return by 19 May 2012. HMRC did not respond to this letter until 9 July 2012 when they advised the appellant to contact the Online Services help desk. It is clear that the delay in replying to the appellant's letter of 15 May 2012 shows that contrary to their submission HMRC had not been able "to provide
35 assistance at the earliest opportunity when a customer makes contact."

19. Although the appellant tried on a number of occasions to get through to the helpline he again had difficulties. The tribunal cannot accept that the appellant made no contact with HMRC online services in 2012.

40 20. It is apparent from what the appellant says that even though the P14 return had been provided in hard copy and the whole return saved on the website and so was available to HMRC the appellant continued to try to clear the "no named supplied" problem until at least 10 December 2012. He spoke to a number of people at HMRC none of whom could assist him until when having the same difficulty with the

submission of the 2012-2013 return he managed to contact someone who could help. As soon as the way to correct the problem was explained to him Mr. Anderson followed the instructions and submitted the return.

5 21. Although it might be said that Mr Anderson should have been more persistent in trying to resolve the issues in his attempts to resolve the issue he either had difficulty in getting through or when he did get through he spoke with people who could not help him or passed him on to someone else who also could not resolve the problem. When the call to the helpline on 10 December 2012 also failed to resolve the problem it must have been very difficult for the appellant to see how he could bring an end to the matter. Even the e-mailed step by step instructions subsequently obtained from the Online helpdesk did not resolve the problem.

15 22. Neither party has provided any logs of telephone calls made. The appellant asserts he has made numerous phone calls but he has provided no details of any calls made in the period 11 December 2012 to 8 May 2013. If there were no calls as HMRC assert then the appellant gives no explanation as to why there were none.

20 23. In considering these circumstances it is the Tribunal's view that the reasonable excuse continued for the period to 10 December 2012 and for a short time beyond. The lack of contact with HMRC between 10 December 2012 and 8 May 2013 at a time when the appellant knew the matter was unresolved does show a lack of persistence and the Tribunal cannot therefore accept that the reasonable excuse existed beyond 31 December 2012.

25 24. The appellant has established a reasonable excuse for the late submission of the Employer's Annual Return (Forms P35 and P14) on line in the period from 19 May 2012 to 31 December 2012. Therefore the appeal is allowed in respect of the whole of the £400 penalty for the period 20 May 2012 to 19 September 2012. The appeal is allowed in part for the £800 penalty for the period 20 September 2012 to 19 May 2013 and it falls to be reduced accordingly.

30 25. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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PETER R. SHEPPARD
TRIBUNAL PRESIDING MEMBER

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RELEASE DATE: 21 October 2013